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No. 518

In the Supreme Court of the United States

October Term, 1944.

M. C. GARBER, *Petitioner,*

vs.

RALPH CREWS, CHARLEY CREWS, ROBERT CREWS, EVERETT CREWS, AMY TRESNER, *NEE* CREWS, AND MARY WILLIS, *NEE* CREWS, *Respondents.*

BRIEF of RESPONDENTS.

L. G. OWEN,
Tulsa, Oklahoma,
Attorney for Respondents.

CHRISTY RUSSELL,
Mattoon, Illinois,

M. F. PRIEBE,
Enid, Oklahoma,
Of Counsel.

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BRIEF *of* RESPONDENTS.

The statement in petitioner's brief is of such great length that it is unwieldy and it seems advisable to make a shorter statement. We, therefore, state what we believe to be the facts material to the determination of the question presented.

Respondents' Statement of the Case.

Petitioner was a stockholder in a national bank and on November 14, 1929, made a bona fide sale and transfer of such stock and such transfer was on that date entered on the records of the bank. (Findings 14 and 15, R. 56 and 57.)

At the close of business on November 25, 1929, the bank sold its assets to another bank and ceased to carry on a banking business and went into voluntary liquidation. (Para-

graph 6 of Statement of Matters Stipulated, R. 27; also, second paragraph of Findings, R. 39.)

Subsequently, in 1937, respondents recovered a judgment against the bank for $249,000—the basis for the judgment being the participation by the bank in the embezzlement of government bonds belonging to respondents, which bonds had been deposited for safe-keeping in such bank, which embezzlements "began in 1922 and continued until some time not long prior to liquidation." (Finding 1, R. 49; also, Findings, paragraph beginning near top of page, R. 43 and continuing to and including R. 44; also, *American National Bank of Enid* v. *Crews*, 191 Okl. 53, 126 P. (2d) 733—the entire opinion in which case is in evidence, as mentioned in last paragraph of footnote 29 to Findings, R. 44.)

Including the above claim of respondents, the bank was insolvent from a period prior to and on November 26, 1929, the date it closed and ceased to do business, and at all times thereafter it was insolvent, taking into consideration that claim; but not taking it into consideration, or excluding it from computation of the liabilities, the bank was solvent until November 26, 1929. (Findings 10 and 11, R. 53 and 54.) It is the above judgment and the fact that it is unpaid and that the bank is insolvent and has nothing with which to pay the same which gives vitality to the stockholder's liability and makes necessary the assessment. (Finding 2, R. 49; also, Findings 4 to 9, R. 52 and 53; also Conclusions 46, 47, 48, 49, 51, 53 and 58, R. 68, 69, 70 and 71.)

The present suit against the stockholders of the bank is in the nature of a creditor's suit to, among other things, assess and enforce stockholder's liability (see paragraph of Findings relating to second cause of action, first paragraph, R. 41; also, paragraph beginning near foot of page, R. 41),

including petitioner's liability by reason of the fact that he had transferred his stock within sixty days prior to the date the bank "failed to meet its obligations"—November 26, 1929—being the first day it failed to open or carry on a banking business.

The trial court held that the bank "failed to meet its obligations" when it ceased to carry on a banking business, *viz.*, on November 26, 1929—the date following sale of its assets and being the first day it failed to open for business; and, further held, that stockholder's liability attached as of that date (Conclusion C-7, R. 54); and, further held, that liability attached to those stockholders who had, within sixty days prior to November 26, 1929, transferred their stock, regardless of whether such transfer was or was not made in good faith (Conclusion C-10, R. 57); specifically holding, also (Conclusion C-13, Sec. 1, R. 61; also Conclusion 53, R. 70), that liability attached to the petitioner, he having transferred his stock within such sixty-day period. Accordingly, since the bank was insolvent and respondents' judgment unpaid (Finding 2, R. 49; also, Findings 4 to 9, R. 52 and 53, and Findings 49 and 51, R. 70), an assessment was made and judgment rendered against the petitioner. (Section 11 of judgment, R. 74, including sub-paragraph (a) thereof, R. 76; also, see Sections 13 and 16 of judgment, R. 78 and 79, and Section 24, R. 82.) That judgment was affirmed by the Circuit Corut of Appeals—*Hoehn* v. *Crews, et al.*, and six other cases, 144 F. (2d) 665.

We think we should mention that in petitioner's statement of the case and at various places throughout his brief —and it will be sufficient on this matter to refer to next to the last paragraph on page 5 of such brief—petitioner presents the case as though liability had been adjudged against petitioner on the theory that he transferred his stock "with

knowledge of the impending failure" of the bank. Such is not the case at all and is a wholly imaginary case. The facts were stipulated and liability was decreed and upheld solely on the fact that petitioner transferred his stock within sixty days prior to failure of the bank to meet its obligations. (See paragraph 15 of stipulated facts, R. 34 and 35; Findings 14 and 15, R. 56 and 57; also, see first paragraph, R. 120, such paragraph being from the opinion of the Circuit Court of Appeals; also, see last paragraph of Opinion on Rehearing, R. 132.) We mention this feature in the hope that the question argued may be narrowed to the facts which were stipulated, to the facts upon which liability was decreed by the trial court, and upon which liability was upheld by the Circuit Court of Appeals—indeed, narrowed to a discussion of this case.

Moreover, at various places in petitioner's brief, statements are made (*e. g.*, paragraph beginning near foot of p. 22), which seem to affirmatively imply, if, indeed, they do not specifically state as a fact, "that it (the bank) was a going concern and continued to be for more than sixty days after such sale." Such an assertion is a total variation from the record, and the references given in our statement completely refute all such pretensions. Yet the cold truth is, aside from the imaginary issue—transfer with knowledge of impending failure—mentioned in the preceding paragraph, and aside from contending, without any supporting authority, that the recovery by respondents in 1937 of a judgment, on a cause of action which existed before and at the time the bank closed, does not establish the debt as of the date the bank closed, the substance of petitioner's brief is built up around and bottomed upon the above specified variation from the record. Notice, for example, the last paragraph on page 35 of such brief.

Many times throughout the brief (*e. g.*, last sentence, p. 10, first paragraph following quotation, p. 29, and last paragraph, p. 37), petitioner appears to make some pretension that the fact that, other than respondents, there were no unpaid creditors of the bank, in some way—just how, we are not informed—operates to relieve petitioner of liability.

There is much in petitioner's brief which is not material or relevant to the proposition to which the writ was limited. There are, also, inaccuracies in that part of the brief; however, since all such matter is beside the point and beyond the permissible scope of this brief, it would be idle and unnecessarily occupy the time of this court for us to detail and summarize such portions.

Question Presented for Decision in This Court.

In granting the writ of *certiorrai*, this court ordered:

> "The petition for writ of *certiorari* is granted limited to the first question presented by the petition for the writ * * *."

In the petition for the writ, the first question presented is there stated at considerable length, page 10, and it is repeated at page 14 of brief of petitioner herein. For convenience, we quote it as follows:

> "Whether the petitioner as a former stockholder in the American National Bank of Enid, Oklahoma, is subject to assessment as a stockholder in said bank under the provisions of par. 64, Title 12, U. S. C. A., he having made a bona fide sale of his stock for valuable consideration in good faith on November 14, 1929, more than sixty days before the failure of such association to meet its obligations, or with knowledge of such impending failure and where, at the time of such sale, such

bank was a solvent and going concern except for an undisclosed and unknown liability to a creditor which was not asserted until a suit was filed by such creditor on such claim more than one year subsequent to the sale by petitioner of his stock, and where such claim was unknown to the creditor filing such suit for more than a year after the sale of such stock and upon which claim the creditor recovered a judgment against such bank on October 29, 1937, nearly eight years after the sale by petitioner of his stock in said bank, and where it is an agreed fact in the case that except for such judgment subsequently recovered by such creditor, that the bank in question was a solvent and going concern and that there is no other creditor of said bank, and where the sale of such stock was made by petitioner in good faith and without any intention of trying to avoid liability as a stockholder in such bank."

The question so stated presents more than the record warrants—"transfer with knowledge of impending failure" —and, we think, the question is otherwise inaptly stated. The real question is: Is a stockholder in a national bank liable under Section 64, Title 12, U. S. C. A., where he in good faith transferred his stock within sixty days of the date on which the bank closed its doors and went into voluntary liquidation, though the liability which required an assessment was unknown to those in whose favor it existed until about a year after the bank closed, and except for such liability the bank, when closed, was solvent?

Summary of Points to Be Discussed.

Petitioner in his brief does not set forth any clear statement of the points to be discussed. The first several pages of petitioner's argument are a quotation of the applicable statute and of various excerpts from the opinion of the Circuit Court of Appeals. Then is a rambling discussion which

seems to present the following inquiry: That since respondents did not discover the wrongful acts of the bank until about a year after it closed and ceased to do business and did not recover a judgment against the bank until 1937, though the basis of the judgment was the wrongful acts of the bank prior to the time it ceased to do business in November, 1929—whether such a judgment establishes the debt as of the date the bank ceased to do business.

We shall answer that contention in the argument under the heading:

Point 1: *A creditor of a national bank which has closed and ceased to carry on a banking business, who thereafter establishes his claim by suit and judgment establishes such claim as of the date the bank closed.*

We shall next present:

Point 2: *The liability of stockholders in a national bank is fixed and determined as of the date it ceases to carry on a banking business.*

Thereafter:

Point 3: *Cases relied on by petitioner, distinguished.*

The questions presented are not difficult, and we shall not make them appear difficult by extended discussion.

ARGUMENT.

Point 1: **A creditor of a national bank which has closed and ceased to carry on a banking business, who thereafter establishes his claim by suit and judgment, establishes such claim as of the date the bank closed.**

In *White* v. *Knox*, 111 U. S. 784, the bank was put into insolvency and a receiver appointed by the Comptroller in 1875. The receiver refused to allow White's claim, whereupon White brought suit and in 1883 recovered judgment. Thereupon, White brought the above suit to compel payment of a dividend on such judgment. The court held that White was entitled to be ratably paid with all creditors —saying:

> "A creditor of an insolvent national bank who establishes his debt by suit and judgment after refusal of the Comptroller of Currency to allow it, is entitled to share in dividends upon the debt and interest so established as of the day of the failure of the bank."

And, in the course of the opinion, further said:

> "The business of the bank must stop when insolvency is declared."

In the present case there was no *declaration* of insolvency in 1929, but the cold stipulated fact is that the bank never opened after November 25, 1929, and that it never thereafter carried on a banking business, but went into voluntary liquidation, and that, including the liability to respondents which was later reduced to judgment, it was then insolvent.

See, also, *Continental National Bank* v. *Holland Banking Company*, 60 F. (2d) 823 (prior decisions reported in 43 F. (2d) 640 and 50 F. (2d) 19), where the case was very

similar to this, in that the suit against the bank was not filed until more than three years after the bank ceased to carry on a banking business and went into voluntary liquidation, which suit resulted in a judgment affirmed three years later (*Holland Banking Co.* v. *Continental National Bank*, 324 Mo. 1, 22 S. W. (2d) 821); then, more than six years after the bank had ceased to do business and had gone into liquidation, the above suit was brought to enforce stockholders' liability. That was the basis of federal jurisdiction.

Point 2: **The liability of stockholders in a national bank is fixed and determined as of the date it ceases to carry on a banking business, and this includes the liability imposed by Section 64, Title 12, U. S. C. A.**

That part of Section 64, Title 12, U. S. C. A., involved here reads:

> " * * * The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer * * * ."

The resolution, R. 94, of November 25, 1929, which formally authorized sale of the assets of the bank, also shows, R. 96, that the bank was then "disposing of its current business and thereafter going into voluntary liquidation * * *." A formal resolution was adopted by stockholders on December 20, 1929, R. 97, which ratified the previous sale of the assets of the bank and "Resolved that the American National Bank of Enid, Oklahoma, be placed in voluntary liquidation under the provisions of Sections 5220 and 5221 of the United States Revised Statutes to take effect immediately, * * *."

Whether, therefore, we take November 26, 1929—the first date the bank ceased to open for a banking business—or December 20, 1929—when it formally went into liquidation—as the date of the "failure to meet obligations," makes no difference in the result, since both dates are within sixty days from November 14, 1929—the date of transfer by petitioner. This feature is mentioned by the trial judge in the last paragraph of foot-note *a*, R. 54.

Richards v. *Attleborough National Bank*, 148 Mass. 187, 19 N. E. 353, is an instructive and well considered case. Therein, the Supreme Judicial Court of Massachusetts said:

> "When liquidation commences, all that is left to the stockholder is the right to share in the assets, or the sum produced therefrom, proportional to his holding; while in the case of national banks he is subjected to a limited proportional liability for the debts which the bank may have incurred. * * * Whether the liquidation of the affairs of the bank be voluntary or involuntary, or whether it proceeds under the authority given to continue in existence in order to close its affairs, it is necessarily implied that the respective rights, not only of the creditors and debtors of the bank, but of the stockholders, are to be determined as of the time when it commences. * * * When a bank is in liquidation the liability of the stockholder for the debts of the corporation has been fixed. If there is a debt due from the bank, he cannot transfer his liability to pay that debt to anyone else, so as to affect the creditor, or subject him, in seeking such remedies as he may have against the stockholders, to any examination beyond the list of those who were so when the liquidation commenced."

That decision was in 1889, so, of course, the court was addressing itself to the law as it then existed. By the 1913

Amendment, Sec. 64, *supra,* creditors are entitled to look not only to those who were stockholders when the failure occurred, but, also, to those stockholders who have within sixty days prior thereto transferred their stock, and this feature is made abundantly clear in *Fletcher* v. *Porter,* 20 F. (2d) 23, giving the legislative history of such amendment. Therein, though observing that the language of the Act is plain and unmistakable, and, therefore, does not present a case where resort may be had to reports of committees or debates in Congress to explain a doubtful provision, nevertheless, further says, among other things:

> "The intent of Congress is shown by the majority report of the House committee on banking and currency which, after referring to the practice which had sprung up of transferring stock in order to evade double liability, said: 'It is believed that by making stockholders who have transferred their shares sixty days before a bank failure equally as liable as if they had not made such transfer, the needs of the situation will be met. Some alleged that the requirements should be that stockholders be liable whenever and so long as it could be proven that they had knowledge of the impending bank failure, but that they should not be liable if in good faith they transferred their shares within sixty days before a failure. This sounds plausible but it is in variance with the facts of experience. The process of proving that a stockholder had knowledge is difficult and expensive, if not impossible in many cases, and it is believed that the sixty-day provision is entirely equitable and far more workable."

The above relates, of course, to the sixty-day provision. In the Senate, there was the further amendment whereby, after the word "obligations" there was added "or with knowledge of such impending failure."

In *Lawrence National Bank* v. *Rice*, 83 F. (2d) 642, the Tenth Circuit approvingly said:

> "In *Richmond* v. *Irons*, 121 U. S. 27, 78 S. Ct. 788, 30 L. ed. 864, the court treated voluntary and involuntary dissolutions as two methods of arriving at the same end, followed by the same rights and liabilities."

As held in *State of Ohio* v. *Union Trust Co.*, 137 Penn. Super. 175, 8 Atl. (2d) 476, the closing of the bank constitutes a failure to meet obligations. Whether that closing be involuntary or by going into voluntary liquidation cannot, we think, be material. Its doors are just as effectively closed and its business just as effectively ceases, whether the closing be voluntary or involuntary:

> "The liability of the stockholder to assessment, in case the insolvency of the bank is subsequently ascertained, is fixed as of the date of the bank's failure to meet obligations, not as of the date the insolvency is ascertained or determined. * * * But if it turns out that it is insolvent, the controlling date as to liability relates back to the time the bank failed to meet its obligations, in order to determine who are the persons against whom the statutory additional liability is to be enforced."

In *Collins* v. *Caldwell*, 29 F. (2d) 329, the assets of the First National Bank were at the close of business on December 23, 1927, transferred to and taken over by the Greenville National Bank, which bank assumed all the liabilities of the First National, except as to stockholders. The First National did not thereafter open for business. On January 11, 1928, the Comptroller took over the affairs of the First National and appointed a receiver. The court held that a failure of the First National to "meet its obligations" occurred on December 24, 1927—the first day it failed to

that a stockholder who transferred her stock on November 5, 1927, which was within sixty days prior to December 24, 1927, was liable under Section 64, *supra*. There, insolvency was not *declared* until January 11, 1928, which was more than sixty days after the stock transfer, but the court held that the bank failed to meet its obligations when it failed to open on December 24, 1927.

If interested in further authority, we commend to the court *McClelland* v. *Merchants & Miners National Bank*, 77 Colo. 302, 236 Pac. 774, and *Broderick* v. *Aaron*, 268 N. Y. 206, 197 N. E. 274.

The effort by petitioner, last paragraph, page 35 of his brief, to avoid the principle of this last case—that closing of the bank occasioned an automatic default in the payment of its debts and liabilities—seems to us, not only to evade the point, but appears to be an effort to leave the impression that the bank in the instant case continued to conduct a banking business for more than sixty days after November 14, 1929—the date of stock transfer by petitioner.

Point 3: **Cases Relied on by Petitioner, Distinguished.**

Petitioner relies on: *Earle* v. *Carson*, 188 U. S. 42; *McDonald, Receiver*, v. *Dewey*, 202 U. S. 510; *Fowler* v. *Crouse*, 175 Fed. 646; *Hodges* v. *Meriweahter*, 50 F. (2d) 29; and, *Brown* v. *Rosenbaum*, 287 N. Y. 510, 41 N. E. (2d) 77.

We assert that none of such cases are applicable, though some of them do involve the imaginary issue which we have previously mentioned as being put forth by petitioner.

Earle v. *Carson*, *supra*, is not based on the applicable statute. That case arose in 1897 (see opinion below, 107

Fed. 639), and the stockholder made a bona fide transfer of his stock prior to the time the bank closed. The statute there involved was amended in 1913 (now being Section 64, Title 12, U. S. C. A.), so as to make transferring stockholders liable in either of two events, *viz.*, if such transfer was *(1)* within sixty days next before the failure of the association to meet its obligations; or, *(2)* with knowledge of the impending failure of the bank.

Our right to recover against petitioner is based on the fact that he was a stockholder and transferred his stock within sixty days of the failure of the bank to meet its obligations. It is established by the agreed facts and the findings in this case that the bank closed and ceased to carry on a banking business on and after November 26, 1929; additionally, that the bank went into voluntary liquidation, at least, not later than December 20, 1929—either of which dates is within sixty days from November 14, 1929, the date of the transfer from petitioner to Oven. Immediately on the failure of the bank to meet its obligations which, we think, beyond dispute was one of the above dates—we think the first, November 26, 1929—the rights of creditors attached under Section 64, *supra*. A stockholder who was such when the failure occurred cannot escape responsibility, *Scott* v. *Deweese*, 181 U. S. 202, 213—which involved the statute before the 1913 amendment. By the 1913 amendment, the liability of stockholders is fixed at sixty days before such failure.

McDonald, Receiver, v. *Dewey, supra*, likewise arose prior to the 1913 amendment—involving transfers made in 1894 and 1895. As to the transfer made prior to the date the bank closed, the gist of the opinion is that the transferror is liable only in the event of bad faith, which would be shown if the transferror knew the bank to be insolvent

at the time of the transfer and transferred to a person of known financial irresponsibility. The case further held, that the burden of showing bad faith was on the one seeking recovery.

Fowler v. *Crouse, supra,* likewise arose under the former statute—involving a transfer made in 1903. The gist of the opinion is that a stockholder (under then existing law) divests himself of double liability by a transfer of his stock when the bank is solvent, or even if insolvent, by a bona fide transfer without knowledge of the insolvency.

In *Hodges* v. *Meriweather, supra,* the transfer was in the early part of 1926, while the bank was an active going concern and about nine months before the bank was, on November 15, 1926, closed by the Comptroller. The transfer was assailed as having been made for the fraudulent purpose of avoiding liability, and as colorable only, and that the transferror knew that the bank was insolvent. The trial court found these issues for the transferror. That judgment was affirmed—the court holding that the burden was on plaintiff to establish such matters; that there was sufficient evidence to warrant the judgment below; hence, that the transfer having been made in good faith while the bank was a going concern and more than nine months before the bank closed, the transferror was not liable to assessment.

Brown v. *Rosenbaum, supra,* relied on by petitioner, is presented under the statement, page 31 of his brief, "The exact question involved in this case has been passed upon in the case of *Brown* v. *Rosenbaum,*" followed by the reporter citation. That case arose in 1933, hence did involve the pertinent statute. The transfer involved was on March 6, 1933, which was during the Banking Holiday proclaimed by the President, at a time, therefore, when the bank was

"closed" under such proclamation. Insolvency was declared and a conservator appointed March 13, 1933. Since the transfer was within sixty days prior to this latter date, of course, the transferror was held liable. The above case was by the transferror against the transferee, to compel the transferee to repay the amount the transferror had been compelled to pay. The defense was that, the bank was "closed" at the time of the transfer, hence had already failed to meet its obligations within the meaning of Section 64, *supra;* that, therefore, the liability of shareholders had already been fixed and that the above transfer did not shift that liability unto the transferee. But the court, very properly, held:

> "When, however, by proclamation of the President and Governor, made pursuant to authority vested in them, the date upon which banking obligations became due and may be paid is postponed, there is, as we have already pointed out, no 'failure' by any bank 'to meet its obligations.' That is the case here. The date of such failure arrives only when a bank fails to open or refuses to meet its obligations which then have matured though other banks are open and carrying on their business without restriction. The Comptroller of the Currency is not charged with responsibility to fix that date. It is fixed according to statute by an act of default, not by an act of insolvency, and the courts must determine when such an act has occurred."

Petitioner attempts to distinguish *Broderick* v. *Aaron*, 268 N. Y. 260, 197 N. E. 274, and eventually, page 36 of his brief, after making what he deems a satisfactory distinction, says that such case supports petitioner's contention. We think he shoots wide of the mark.

In that case, the bank was closed by the Superintendent of Banks, and the court held—consistently with what we believe to be the universal rule—that:

"* * * the closing of the bank occasioned an automatic default in the payment of its debts and liabilities."

Immediately following his quotation of such excerpt, petitioner, page 35 of his brief, in an effort to distinguish that case, says:

"This was bound to be true because the bank was taken over by the Superintendent of Banks *and closed and it no longer continued to conduct the business of a bank.*" (Emphasis ours.)

If petitioner, by the above emphasized part of such statement, does not mean to imply and leave the impression that in the case at bar the bank was not closed on and after November 26, 1929, and that it did thereafter continue to conduct the business of a bank—then what does he mean by such statement?

On the very next page of the decision in the above case (about half way down in the second column on page 277 of 197 N. E.), addressing itself to the proposition that the status of stockholders for the purpose of determining their liability must be fixed as of a particular date and that when so fixed it becomes unchangeable, the court said:

"That date cannot be later than the date of the closing of the bank, when such closing is followed by liquidation."

We have not been referred to any case, and we do not believe that there is any case, holding that the rule which prevails where liquidation is voluntary is any different from the rule which prevails where liquidation is involuntary.

It is not beyond permissible argument, we think, for us to say to our opponent: If he really contends, notwith-

standing this bank closed its doors and never engaged in the banking business after November 25, 1929, and notwithstanding it went into voluntary liquidation not later than December 20, 1929; that, nevertheless, it did not fail to meet its obligations within sixty days from November 14, 1929, then, on oral argument, let him give the date when he says it did fail to meet its obligations.

Conclusion.

Much is said in petitioner's brief to the supposed point that, since respondents did not, prior to the time the bank closed, discover their cause of action against the bank, that, therefore, they should now be turned away without recourse to the only responsible source to which they may look. One is brought to wonder if petitioner does not know that embezzlers do not usually make known their surreptitious acts to their victims, and that embezzlement and concealment of the resulting spoliation go hand in hand.

Reduced to its final analysis, petitioner's argument is this: Though respondents obtained a judgment satisfying the court and jury and the Supreme Court of the State of Oklahoma, that such embezzlements had occurred and had been concealed, including a satisfactory showing as to why respondents had not earlier discovered the same—that, nevertheless, respondents must now be told that, since, before discovery, the bank had closed and was insolvent and respondents left without recourse unless against stockholders in a bank which had grown fat upon respondents' money ($249,000); that, because of the bank's concealment, such recourse cannot be had. Such a pretension is but to say, that the greater the fraud, the greater the security from responsibility therefor.

There is good reason why no pertinent case is cited in support of petitioner's contentions. His contentions find no support either in reason or in the decided cases, and the length of this brief can be justified only in the fact that petitioner's brief is but a rambling discussion and does not clearly exhibit the case.

Respectfully submitted,

L. G. OWEN,
Attorney for Respondents.

CHRISTY RUSSELL,
M. F. PRIEBE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 518.—October Term, 1944.

M. C. Garber, Petitioner, *vs.* Ralph Crews, Charley Crews, Robert Crews, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 26, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

We are called upon to determine the application in the circumstances of this case of Sec. 23 of the Act of Dec. 23, 1913,[1] which imposes liability upon stockholders of a closed national bank.

November 25, 1929, the American National Bank of Enid, Oklahoma, pursuant to a resolution of its directors, which recited that it contemplated "disposing of its current business and thereafter going into voluntary liquidation," sold its business and transferred its assets to the First National Bank of the same city in consideration of the payment of $350,000 and the assumption of its liabilities as disclosed by its books. The purchasing bank retained $110,000 to guarantee the collection of negotiable paper taken over and to cover certain real estate temporarily retained by the seller. American closed its business and promptly distributed the $240,000 cash received ratably amongst its stockholders.

The respondents were parties to an agreement, made in 1922, whereby large sums were deposited in a bank to await the settlement of disputes relative to the ownership of the funds deposited. In 1930 settlement was reached and demand made by the respondents for the payment of the deposit. It was then discovered that the fund had been dissipated and that officers of American, which was a correspondent of the bank of deposit, had participated in the embezzlements. The respondents thereupon brought action in a State court against American, its officers and directors, to fasten liability on the bank and the individuals. A judgment

[1] c. 6, 38 Stat. 251, 273, 12 U. S. C. § 64.

against American for $249,000 was affirmed by the Supreme Court of Oklahoma.[2]

The respondents brought the present suit in the District Court for Western Oklahoma to establish a trust in the liquidating dividend of $240,000 paid by American to its stockholders and to recover from the stockholders the amount necessary to satisfy the balance of the judgment remaining after restitution by stockholders of the liquidating dividend; that is, to enforce the double liability of stockholders. Recovery was had on each cause of action, and also on a third against the former directors of American. The Circuit Court of Appeals affirmed the judgment on the first and second causes of action and ordered dismissal of the third.[3]

On November 14, 1929, the petitioner sold his stock in American in good faith and for a valuable consideration to one Oven. December 20, 1929, the stockholders and directors of American held the necessary meetings and took appropriate action under the National Bank Act,[4] to go into voluntary liquidation and thereafter such liquidation went forward. It will be observed that the sale of petitioner's stock was within sixty days of November 20th and within sixty days of December 20th. The petitioner was a defendant in the present action to enforce stockholders' liability and judgment went against him as a stockholder. In a petition for certiorari he urged a number of defenses which the Circuit Court of Appeals had overruled. We granted certiorari limited to the question whether his sale of his stock relieved him of liability.[5]

Does § 23 of the Act of 1913 justify the judgment against the petitioner? The statute reads in part:

"The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer."

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[2] American National Bank of Enid v. Crews, 191 Okla. 53, 126 P. 2d 733.

[3] Hoehn v. Crews, 144 F. 2d 665.

[4] 12 U. S. C. § 181.

[5] 323 U. S. —.

We are of opinion that the petitioner is within the plain terms of the law. On its face, the Act grants no exemption due to the facts that the sale was made for consideration and in good faith; that, at the time, American was believed to be solvent; or that the existence of the claim ultimately established by the respondents was then not known to the respondents or to the petitioner.

Prior to the adoption of § 23 as a part of the Federal Reserve Act of 1913,[6] the liability of shareholders in a national banking association had been imposed by R. S. 5151. Section 23 of the Act of 1913 reenacted, with slight verbal changes, the first clause of the first sentence of R. S. 5151, which provided:

"The shareholders of every national banking association shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares;"

R. S. 5151 had been before this and other courts for interpretation and, under it, it was held that the gist of any action to impose liability upon a stockholder who had transferred his shares prior to the actual closing of the bank was that the transfer was not a real one or was fraudulent; that is, made with the purpose to avoid the statutory liability.[7] It is obvious that when Congress came to write the Act of 1913 it intended, while leaving the right of recovery for transfers not falling within sixty days of the bank's closing to be adjudged according to the old standard of fraud or intended evasion of liability, to announce a drastic new rule denying effect to all transfers made within sixty days of the bank's cessation of business. It is impossible to read the new enactment of 1913 in any other sense. The only cases dealing with the question in lower federal courts have so held.[8]

The petitioner insists that, as the initiation of the liquidation of American was voluntary, no cause of action against stockholders arose by reason of this action. But we think that where a bank closes its doors and ceases to transact business the right

[6] *Supra*, Note 1.

[7] National Bank v. Case, 99 U. S. 628; Bowden v. Johnson, 107 U. S. 251; Whitney v. Butler, 118 U. S. 655; Stuart v. Hayden, 169 U. S. 1; Earle v. Carson, 188 U. S. 42; McDonald v. Dewey, 202 U. S. 510.

[8] Fletcher v. Porter, 20 F. 2d 23, and Collins v. Caldwell, 29 F. 2d 329, are in accord with the decision of the Circuit Court of Appeals in the instant case.

of creditors or of a receiver to enforce stockholders' liability matures at the time of such closing whether as a result of voluntary action or of adverse action by the Comptroller of the Currency, or of the appointment of a receiver, if at that time the bank was insolvent, as American undoubtedly was, if the spondents' claim was taken into the reckoning.[9]

The judgment of the court below was right and must be affirmed.

[9] Compare Richmond *v.* Irons, 121 U. S. 27, 48, 50.